COPY

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

BRIEF FOR JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT, OPPOSING THE PETITION FOR CERTIORARI.

JOHN C. BANE, JR.,
Pittsburgh, Pennsylvania,
Attorney for Respondent.

PAUL J. WINSCHEL,
Of Counsel.

SMITH BROS. CO., INC., LAW PRINTERS, 416 BOULEVARD OF ALLIES, PITTSBURGH, PA.

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BRIEF FOR JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT, OPPOSING THE PETITION FOR CERTIORARI.

COUNTER-STATEMENT OF THE CASE.

On March 15, 1943, the United Steelworkers of America (CIO), the Union involved in this case, filed with the National Labor Relations Board a petition under Section 9 (c) of the National Labor Relations Act by which it sought to be qualified as the "exclusive representative," for the purposes of that Act, of the force of about sixty plant police then employed at the Otis steel works of the respondent Jones & Laughlin Steel Corporation in Cleveland, Ohio (R. 1-2).

In the course of a hearing held by the Board upon this petition, at Cleveland, on April 8, 1943 (R. 2), it was shown

1. That the Otis Works was a large, integrated steel manufacturing establishment, then devoted largely or wholly to the production of war materials and munitions (R. 4);

2. That the members of the force of plant police had all been sworn and enrolled as members of the Auxiliary Military Police organization, an agency of the United States Army (R. 6-7, etc.);

3. That the members of the militarized police force were wholly responsible to the Steel Corporation (which paid their salaries) and to the Army (which had the legal power to direct their work) for the maintenance of law, order, discipline and security in the Works and amongst a force of about 4,700 mechanics, artisans and laborers regularly employed in the Works, in the production of steel and the maintenance of the plant (R. 6-12); and

4. That the Union, which sought to be qualified as "exclusive representative" of the militarized plant police, had for a long time been qualified and was then acting as "exclusive representative" of the 4,700 operative steel workers and maintenance men (R. 5; 15, etc.).

Relying upon these, the facts in the record, the Steel Corporation urged that the Union's petition be dismissed (R. 53); but in a decision published on May 3, 1943, the Board rejected the Company's contentions (R. 52-55), and determined to hold an election by secret ballot, testing the desires of the policemen in the matter. At the election, held May 26, 1943, a majority of the ballots favored the Union (R. 33) and on June 5, 1943, the Board issued a Certification of the Union as exclusive representative of the entire police force (R. 34-35).

With this Certification in hand, the Union demanded that the Company recognize it and bargain with it as representative of the policemen, maintaining of course its position as representative also of the thousands of rank and file steel workers in the Works. This demand was rejected[1] (R. 55-56); and thereupon the Union commenced further proceedings before the Board—of the kind contemplated by Section 10 of the Act. In these proceedings the Board held further hearings, on September 28, 1943 (R. 41). At the further hearings, no new fact of significance here was added to the record; but at the hearing and in the proceedings which followed the Company renewed its contentions, amongst them the contention that a Union of the rank and file steel workers could not be legally qualified to represent the policemen.[2] The contrary assertion made at page 28 of the petition for certiorari reflects a serious error of fact on the part of the petitioner.

On December 2, 1943, the Board handed down its Final Order in the case (R. 73), adopting the Intermediate Report of its Trial Examiner (R. 61), rejecting the Steel Corporation's contentions of law, and commanding the Company to recognize the Union as repre-

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1. Although the precise point of law may not have been settled, it is believed that the Certification had no legally compulsive force or effect (see *A. F. of L. v. N.L.R.B.*, 308 U.S 401; *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248); and that the Steel Corporation was bound to deny it any force, if it desired to contest the Union's qualifications in the Courts.

2. See, for example, the Company's exceptions to the Intermediate Report of the Board's Trial Examiner (R. 68-69, etc.) and its statement of its position (R. 50) offered in evidence at the Board's hearing of September 21, 1943 (R. 60):

> "The corporation moved to dismiss the petition [of the Union for Certification] because the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants * * *."

sentative of the police. On February 1, 1944, the Board filed a petition for enforcement of its Order in the Sixth Circuit Court of Appeals (R. 76). This petition was resisted by the Company; and on October 16, 1944, the case was argued before the Court. On December 8, 1944, the Court handed down its decision (R. 83), now reported as *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 146 Fed. (2d) 718; and thereby denied the Board's petition, and held the Board's decision legally wrong, upon the grounds, principally, that by attempting to subject the plant police to the jurisdiction of the rank and file steel workers' Union, the Board had failed to give proper weight to the public need, in time of war, that such militarized guards be free from any control, direct or indirect, by the rank and file against whom they were duty-bound to enforce the law.

In the meantime, the military status of the Otis Works policemen had changed. On August 5, 1944, more than two months before the argument in the Circuit Court and about four months before its decision, they had been "demilitarized," or discharged from their enrollments in the military police service, pursuant to a change in the Army's general plans; and they had, almost simultaneously been sworn and enrolled instead (according to the Army's new plans) as members of the municipal police force of the City of Cleveland, and so as peace officers of the State of Ohio (R. 114-115; 121-122).[3]

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3. The assertions made by the Board, at page 16 of the Petition for Certiorari and elsewhere in its arguments, that the Otis Works police have always been members of the Cleveland police force is not supported by the record or in accord with the facts. Before the late war, the plant police were also City police; during the period of "militarization" they were not; and then, after their "demilitarization" they re-

This change, which may or may not have been known to the Board, but which had not previously been called to the attention of the Circuit Court of Appeals, was made known, in part, to that Court in a Petition for Rehearing, filed by the Board on January 8, 1945 (R. 89, 93), and then, again in part, to this Court in the Board's Petition for Certiorari filed here at docket No. 1237 October Term, 1944 (p. 27). In each instance, the Board's pleading disclosed that the guards had been "demilitarized," but it did not disclose (and it is possible that the Board did not know) the related fact that, at about the same time, and as a part of the same transaction, the demilitarized guards had acquired the status of municipal police.

In a memorandum order entered on June 4, 1945 (325 U.S. 838) this Court granted the Board's petition, vacated the decision of the Circuit Court of Appeals, and remanded the case to that Court, "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof upon the Board's orders." In due course, the record was remanded and on February 8, 1946, the case was called for further argument in the Circuit Court of Appeals.

In the meantime, at the instance of the Board, counsel for both parties had stipulated the accuracy of a written description of the changed circumstances of the plant policemen, including the facts that they had been demilitarized and made members of the Cleveland police

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newed their connections with the City police force. This is important because, contrary to the Board's assumption, it shows that while the case was pending before the Board, no municipal police status could have been claimed for the military guards.

force, and the fact that their functions and duties as municipal police were the same, in all essentials, as they had been during the period of militarization (R. 114-118).

When the case was called for argument in the Circuit Court, the Board presented this stipulation as an exhibit to a new motion for enforcement of its original order (R. 112-114), and called upon the Court to consider the facts set forth in the stipulation, and upon such consideration thereof to enter a decree enforcing the Board's original, final order. In reply to this argument, the Steel Corporation contended, in both its written and oral presentations of the case, that the Court could not consider any such new fact, or any fact not disclosed in the record certified by the Board at the outset of the case; and, secondly, that whether the new facts be considered or not, the Court should reaffirm its original decision, and again deny enforcement of the Board's order.

On April 4, 1946, the Circuit Court entered a new decision of the case. Upon the propriety of its consideration of the new facts set out in the stipulation, it upheld the Board, and—interpreting the mandate of this Court as the Board had interpreted it—expressly rejected the Steel Corporation's contention that the new facts could not be considered. But upon the other question presented by the parties: the question whether the changed circumstances shown in the stipulation called for a change in the Court's original decision of the case, the Court upheld the Steel Corporation and rejected the contentions of the Board, holding again that the Board's order must be denied enforcement (R. 118-122):

N.L.R.B. v. Jones & Laughlin Steel Corporation, 154 Fed. (2d) 932.

This is the decision which the Board seeks to present for review, by its present petition for certiorari. To complete a history of the case, it is necessary to add to what has been said, only that on May 20, 1946, the Court below denied (R. 134) a petition for rehearing which had been filed by the Board (R. 123-134).

SUMMARY OF ARGUMENT.

I. Whether it was right or wrong, the manner in which the Court below considered the new circumstances cannot justify a review of its decision of this case. The Court disposed of this matter in the manner urged upon it by the Board, and opposed by the Steel Corporation. Even if this was wrong, the Board cannot complain of an error resulting from its own intentional conduct of its case.

II. Properly considered, the record presents no case which should now be reviewed or decided by this Court.

1. Properly considered, the record presents only a question of the status of auxiliary military policemen under the National Labor Relations Act.

2. The status of auxiliary military policemen under the Act is now of no general or immediate importance, because the military police force has been wholly disbanded.

3. The important underlying question: that of the Board's powers and duties in cases involving

municipal police, foremen and other similar classes of people, can and will be presented more fairly in other cases which will almost certainly be laid before this Court in the near future.

ARGUMENT.

I. Whether It Was Wright or Wrong, the Manner in Which the Court Below Considered the New Circumstances Cannot Justify a Review of Its Decision of This Case.

It is elementary that if a party to litigation invites and so brings about some ruling or course of action on the part of the Court, he cannot complain later that the ruling or course of action was wrong. He is estopped by one of those principles of equity, common sense and fair dealing which are indispensable to the orderly procedure of the business of the Courts. The rule is illustrated in:

U. S. v. Memphis, 97 U.S. 284
Law v. U.S., 266 U.S. 494
Mercelis v. Wilson, 235 U.S. 579

—and many other cases.

This rule condemns wholly the first, and apparently the principal, of the "reasons" urged by the Petition for Certiorari as grounds for the allowance of the writ in this case. Beginning its statement of this "reason" at page 26 of the Petition, the Board argues for page after page that, under the National Labor Relations Act a reviewing Court can only review facts and questions which have been passed upon by the Board, and embodied in the Board's transcript of its own record filed with the

Court; that, as a result, the Court below should not have considered the additional facts set out in the Stipulation (R. 114); and that its consideration of those facts calls for the reversal of its decision.

Under the rule of law, this argument is not open to the Board in this case. In the Court below, its premises were argued by the respondent, and resisted by the Board. The Board procured the Stipulation, presented it to the Court, and urged the Court to consider it, against the most vigorous objections by the respondent that, under Section 10 (e) of the Act and the decision in *N.L.R.B. v. Newport News Shipbuilding Co.*, 308 U.S. 241, the Court must consider no fact not disclosed in the original transcript. When it considered the Stipulation, the Court took the course urged on it by the Board; and, whether it was right or wrong in so doing, the Board cannot be heard to criticize its decision on this account.[4]

4. Throughout the case, the Board has shown an irritating disregard for the very rule it relies upon in this part of its present argument. It has never been restrained from asserting any matter of fact, by the absence of any proof of it in the record. For example, in the present Petition for Certiorari, the Board treats as a fact of the case an important new matter of which it was, "following the close of the hearing, advised by its regional director" (Petition, p. 13). It refers to facts developed by "a survey by the Board which has not yet been completed" (Id. p. 27). It describes, in a fragmentary and inaccurate way, the alleged experiences of other employers, in other industries formerly served by militarized guards (Id. p. 35). None of these things can be the subject of judicial notice, and none was ever the subject of any offer of evidence in this case. The Board's reliance upon them here shows either that this case was not properly prepared or fairly presented, while it was pending before the Board, or else that there was not, at that time, any case worthy of presentation.

II. Properly Considered, the Record Presents No Case Which Should Now Be Reviewed or Decided by This Court.

1. *Properly considered, the case presents only a question of the status of auxiliary military policemen under the National Labor Relations Act.*

If it be true, as the respondent has always contended and as the Board now agrees, that the scope of judicial review in this case is limited to a consideration of the evidence received by the Board in due form prior to its decision of December 2, 1943 (R. 73) and of questions of law arguable on that evidence, then it must follow that the only question which can be decided by the Courts is a very narrow one: Can the National Labor Relations Board confer upon a Union, dominated by the thousands of rank and file steel workers employed in war time in a steel plant devoted to the manufacture of munitions of war, a legally enforceable right to act as "exclusive representative" of the force of military police who must be relied upon by the plant owner, the Army and the public at large to enforce the law in the plant and to prevent its injury by acts of sabotage or trespass?

This was the question, and the only question, ultimately raised by the pleadings and evidence contained in the record made in this case before the Board.

2. *The status of auxiliary military policemen under the Act is now of no general or immediate importance, because the military police force has been wholly disbanded.*

On December 8, 1943, when the Court below handed down its original decision of this case, the security of war plants, such as the Otis Works, was a matter of peculiar public concern. The success of the war effort depended, it seemed, upon the security of manufacturing plants against interrupted or demoralized operations. And in cases involving such great industrial establishments as the Otis Works, the security of the productive plants depended, in turn, wholly or almost wholly upon the efficiency of the forces of auxiliary military policemen, in the discharge of their duties. These policemen were of necessity relied upon by the public at large to detect and if possible to prevent any act of trespass or sabotage, or other wrongful character likely to interrupt or hamper war production or to demoralize war workers, and to make possible the lawful redress of such acts, where prevention should not be successful.

The importance of these functions of the auxiliary military police was not changed by their "demilitarization," coupled as it was with their enrollment as members of state and city police forces. This was made clear, for example, by the order "demilitarizing" the force of police at the Otis Works (R. 117-118). Instead, the policy of demilitarization served only to transfer from the Army to the other, local authorities a substantial part of the burdens of directing and supervising this phase of the general security program, at a time when the Army's other burdens must have seemed sufficient to tax its resources of officers and men.

Remembering all the circumstances of that period of our history, it seems plain that the status of the auxiliary military police as regarded the industrial labor unions was—at that time—a matter of great public importance. It seems equally plain that a judicial decision intended to avoid any threat against their efficiency was a proper decision; and that the original decision of this case by the Court below was, for that reason, the only proper disposition of the case.

But, whether it was right or wrong, that decision was intended to settle a question which does not exist today. The war is over, and the organization of auxiliary military police has long since served its purpose, and no longer exists. The legal status of auxiliary military police, under the National Labor Relations Act, is, today and in itself, a matter of no general or immediate importance to anybody. Thus the principal question originally raised in this case is, in a broad sense, a moot question, of the kind which does not call for or justify the consideration of this Court. See *District of Columbia v. Sweeney,* 310 U.S. 631.

3. *The important underlying question: that of the Board's powers and duties in cases involving municipal police, foremen and other similar classes of people, can and will be presented more fairly in other cases which will almost certainly be laid before this Court in the near future.*

(a) IN THE VIEW OF THE STEEL CORPORATION, THIS CASE DOES RAISE A QUESTION OF GENERAL IMPORTANCE.

In both of its decisions of this case, the Circuit Court of Appeals accepted as sound the proposition that if, as "exclusive representative" a union has the legal power to control the conditions upon which any particular individual may hold and do his job, and earn his living, then the constituent individual must be subject, in some degree, to at least potential domination by the union—which means by the union's leaders, or ultimately by the mass of members who can, if they choose, control the leaders. This proposition had long been accepted by the Board itself:

In re Maryland Drydock Company, 49 N.L.R.B. 733 (1943);

In re Budd Wheel Co., 52 N.L.R.B. 666, 668-9 (1943);

In re Soss Manufacturing Co., 56 N.L.R.B. 348 (1944);

In re Rochester, etc. Coal Co., 56 N.L.R.B. 1760 (1944).

In the same way, in both of its decisions herein, the Court below accepted as sound a second, closely related proposition, which, likewise, had long been accepted by

the Board itself: the proposition that under the Act the Board must draw a line between supervisors, foremen, policemen and others whose undivided allegiance is indispensable to the proper functioning of management, on the one hand, and, on the other, those classes of labor whose functions (in so far as they concern any public interest) are not incompatible with allegiance to labor unions; and that the Board must, while encouraging union organization of the latter class, avoid enforcing union jurisdiction or domination of the former. This was the principle of the Board's decisions of the four cases just cited, and of many others in which it has described the limits of union jurisdiction. It was the principle of such judicial precedents as *N.L.R.B. v. Delaware-New Jersey Ferry Co.*, 128 Fed. (2) 130 (3 C.C.A., 1942). It was consistent with every judicial interpretation of the Act, including the decisions of this Court in such cases as *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, and *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31. It has never been doubted or rejected by any Court; and it has been abandoned by the Board only in a series of mutually related cases, all very recently decided.

Accepting the interpretation of the Act implied in these two principles, accepting, that is, the view that the "policy of the Act" is among other things to protect every sound public interest, the Court below was bound to deny enforcement of the Board's order. If the Act, properly interpreted, requires the Board to set any limit upon the scope of union jurisdiction under the Act (and it is hard to conceive that Congress intended to leave this to employers or employees or to unions, ignor-

ing the interests of the public[5]), the only line that can be drawn is that long recognized by the Board itself —the line between management and labor. If the line is to be drawn at that point, and if such militarized police as have figured in this case are on either side of the line—if they are "employees" for any purpose and not purely governmental agents and so exempt from the scope of the Act—then they must be placed on the management side of the line. As the Board (and the unions) recognized until 1941 or 1942,[6] the members of the police force in any large industrial plant are an essential part of the executive arms of private management and public law, who must, if they are to serve as anything much more than ornaments, be free to stand up for the interests of management and the law, when those interests are threatened by any other force—including that of the unionized rank and file. In this particular case, the "militarization" of the policemen, and the other circumstances of the case which were incidents of the World War, emphasized the public need for the efficiency and freedom of the policemen, whether they changed the status of the policemen under the Act or not.

In its recent decisions, in this case and in those others which are referred to and reflected in the Petition for Certiorari, the Board has attempted to abandon the

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5. Cf.: *N.L.R.B. v. Delaware-New Jersey Ferry Co., supra;* and *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, at page 165: "As a standard [in setting the limits of bargaining units under Section 9 of the Act] the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the Act * * *."

6. See, *e.g.*: *In re R.C.A. Manufacturing Co. and U.E.R. Workers*, 2 N.L.R.B. 159 (1938); *Southern California Gas Co. and U.W.O.C.*, 10 N.L.R.B. 1123 (1939), and later Board decisions to the same effect, prior to 1942.

management-labor line as its limit of union jurisdiction. This new tendency on the part of the Board has encouraged a rather general movement on the part of the Unions in which the tendency originated: a systematic movement by the Unions in certain industries to extend their jurisdiction and their economic influence by organizing and seeking the legal right to represent segments of management. This movement, so encouraged, has given rise to one of the principal issues in controversy today between industrial employers and labor unions; and to the extent that it may have decided this issue, by requiring the Board to avoid enforcing the representation of both management and labor by a single Union, the decision of the Circuit Court of Appeals in this case presents a question of great and general importance.

It does not follow, however, that the Petition for Certiorari should be granted. Instead, for at least two reasons, it should not.

(b) However, the petition for certiorari is based upon the contention that the important question is not raised in this case.

Of these two reasons for denying a review of this case, the first is that the Petition for Certiorari contends that, because the question of the Board's power had not been raised by the record before the Board, the Circuit Court of Appeals had no power to decide it. If that assumption of the petition were to be accepted,[7] it would

7. It is, of course, the contention of the respondent Steel Corporation that, for reasons which are discussed above, the question of the Board's power to enforce recognition of a single union as representative

follow that this Court could have no power, were the Petition for Certiorari granted, to decide the only really new or important question which can possibly be dealt with in this case by this Court.

(c) THE IMPORTANT QUESTION IS MORE FAIRLY RAISED IN OTHER CASES WHICH WILL ALMOST CERTAINLY BE LAID BEFORE THIS COURT IN THE NEAR FUTURE.

It has been observed that, because of its importance to industry, to labor unions and to the public, the question of the Board's powers and duties in cases in which unions desire jurisdiction of supervisors, foremen, policemen or others traditionally identified with industrial management and not with Union labor, is such a question as will ultimately deserve the consideration of this Court. Should the Court see fit to consider and decide it, however, there is no particular reason to choose this case as the occasion for such a review. Several other cases presenting the question more fairly either have been laid before this Court or will soon be laid before it, unless in the meantime the question becomes much less important than it now appears. As the Board indicates in its Petition for Certiorari (p. 36), a phase of the question is presented in the Petition for Certiorari now pending here in *Packard Motor Car Company v. N.L.R.B.*, No. 658 October Term, 1946; and the precise question is presented by the records in the cases involving the Pittsburgh Works of the Jones & Laughlin

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of both management and labor was duly raised before the Board and therefore open to consideration by the Court below. An inspection of the Board's original brief in that Court will show that it there treated the question of its power and duty in such a matter as the principal question in the case.

Steel Corporation, pending since 1942 before the Board but still undetermined (see Petition for Certiorari, p. 28) and in two cases now awaiting decisions, respectively, in the Eighth and Tenth Circuits (Petition, p. 27, note 17). It is squarely raised also in many other cases pending before the Board or in the lower Courts, amongst them in the Board's case No. 6-R-1191, in which the United Mine Workers of America, a rank and file labor Union, has sought jurisdiction of the underground supervisory forces in the coal mines of the Jones & Laughlin Steel Corporation.

If any of these other records shall be reviewable by this Court (and some of them are certain, it appears, to be offered for such a review), the important question will be presented fairly and cleanly. It will not be confused, as it must be here, by such abnormal circumstances as the "militarization" of the Otis Works police, the unusual public importance of such policemen in time of war, and the Board's peculiar contention that the important question is not properly raised in this record.

Conclusion.

It is submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

JOHN C. BANE, JR.,
747 Union Trust Building,
Pittsburgh, Pennsylvania.

Attorney for Respondent, Jones & Laughlin Steel Corporation.